UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

ALABAMA PROTEIN RECYCLING, L.L.C.,

Debtor.

Case No. 01-721-WRS
Chapter 7

TOM MCGREGOR, Trustee,
CITY OF TROY INDUSTRIAL
DEVELOPMENT BOARD,

Plaintiffs,

v.

WILLIAM B. BLOUNT,
B.P. HOLDINGS, L.L.C.,

Defendants.

Adv. Pro. No. 02-3083-WRS

Memorandum Decision

I. FACTS

A. Procedural Setting

This Adversary Proceeding arises in an involuntary Chapter 7 bankruptcy proceeding which was brought against Alabama Protein Recycling, L.L.C. ("APR"). On February 5, 2001, three unrelated creditors petitioned this Court for relief pursuant to 11 U.S.C. § 303. No answer was made on behalf of APR and on April 10, 2001, this Court entered an order for relief, adjudicating that APR was an involuntary debtor under Chapter 7 of the Bankruptcy Code. (Case No. 01-721, Doc. 11). On April 12, 2001, Tom McGregor ("McGregor") was appointed Chapter 7 Trustee in this involuntary proceeding. (Case No. 01-721, Doc. 12). It is the function

of a Chapter 7 Trustee to liquidate causes of action owned by the estate. 11 U.S.C. § 704(1). On July 30, 2001, McGregor made application to hire counsel to bring this Adversary Proceeding. (Case No. 01-721, Doc. 27). On August 8, 2001, the Court approved McGregor's application to hire counsel. (Case No. 01-721, Doc. 30).

On July 8, 2002, McGregor, in his capacity as Chapter 7 Trustee, brought suit on behalf of the estate against William B. Blount individually, B.P. Holdings, L.L.C. and American Proteins, Inc. (Doc. 1). On March 31, 2003, the Trustee moved to join the City of Troy Industrial Development Board ("IDB") as an additional named Plaintiff. (Doc. 29). The Court granted that motion on May 1, 2003. (Doc. 33). The Court found, after hearing the evidence, that the IDB did not own any interest in the subject trucks and by way of a separate order will dismiss the IDB as a party to this Adversary Proceeding. On September 4, 2003, the Trustee moved to dismiss American Proteins, Inc.,[1] as a named party defendant in this Adversary Proceeding. On September 9, 2003, the Court dismissed American Proteins as a party defendant. (Doc. 50).

The adversary proceeding came before the Court for trial on September 11, 2003, at the United States Bankruptcy Court, Montgomery, Alabama. Floyd Gilliland, counsel for the Trustee, and Leonard Math, counsel for the City of Troy Industrial Development Board, were

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[1] Alabama Protein Recycling (the Debtor) and American Proteins, Inc., (the purchaser of the subject trucks and at one time a defendant in this action) are unrelated entities. Their only contact with one another was that on November 20, 2000, American Proteins, Inc., purchased five trucks from Alabama Protein Recycling. The similarity of the two names is confusing. In an effort to clarify, the Court will refer to Alabama Protein Recycling as "APR" and to American Proteins, Inc., as "American Proteins."

present for the Plaintiffs. Lee Benton and Gayle Douglas, counsel for the Defendants, were also present. The Court heard evidence and testimony on the record. At the conclusion of the hearing, the Court took the matter under advisement and requested that the parties submit proposed findings of fact and conclusions of law for the Court's review. (Docs. 55 & 56). Upon consideration of the evidence and the record, the Court will enter a judgment in favor of the Trustee in the amount of $220,878.27.

B. Background

This Adversary Proceeding arises out of the sale of five trucks to American Proteins on November 20, 2000. The Trustee contends that the trucks in question were property of APR and that the sale was a fraudulent conveyance pursuant to 11 U.S.C. § 548.[2] In addition, the Trustee asserts causes of action under Alabama law for fraudulent conveyance, conversion and unjust enrichment. (Doc. 1, amended by Docs. 19 & 21). At the close of the hearing, the Trustee orally moved to amend the pleadings to conform to the evidence and include a cause of action for preference pursuant to 11 U.S.C. § 547. See Doc. 56. The Defendants objected to the oral motion to amend. Doc. 57.

Defendants contend that the trucks in question were property of the IDB and that Plaintiffs have not proven that Defendants acted with an intent to hinder, delay or defraud creditors. Defendants further argue that Defendant B.P. Holdings acted only as a conduit in receiving a check on behalf of APR, that the money held by B.P. Holdings did not belong to the

[2]Transfers made within one year of the date of a petition in bankruptcy may be set aside as fraudulent conveyances provided that the elements of a fraudulent conveyance are proved. 11 U.S.C. § 548.

Debtor and that Defendant William Blount ("Blount") acted solely in a corporate capacity and cannot be personally liable. (Docs. 5, 27, 55). The parties stipulate that the Debtor was insolvent at the time the trucks were sold to American Proteins. (Doc. 55). The involuntary petition in bankruptcy was filed within 90 days of the sale of trucks. (Case No. 01-721, filed February 5, 2001).

The evidence adduced at trial showed that the Debtor was an Alabama limited liability company formed in 1998. The company had two members, F.J. Mullis ("Mullis"), who held a 60% interest and B. P. Holdings, L.L.C., one of the Defendants in this case, who held a 40% interest. Defendant Blount is the managing member of B.P. Holdings, L.L.C.. In order to finance the business venture, the IDB assisted through a 6.8 million dollar bond issue underwritten by Blount Parrish & Company.[3]

Around the same time as the bond issue, the IDB and APR entered into a lease agreement whereby the IDB leased all of the project assets to APR. (See Lease Agreement, PEX 2/DEX 7). Contemporaneously, the IDB assigned their interest under the lease to Regions Bank as the trustee for the bondholders. (See Mortgage and Trust Indenture, PEX 3/DEX 6). APR was to make its payments to Regions, who in turn would pay the bondholders.[4]

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[3]The purpose of using the IDB for the bond issue was to make the bonds more attractive to potential investors because the IDB has the authority to issue tax exempt bonds. In this instance there were two series of bonds issued: series-A and series-B. The series-B bonds are used for working capital and are not tax-exempt, whereas the series-A bonds are used for capitalizable assets like land, buildings and equipment and are tax exempt. There were more series-A bonds sold for this project than series-B.

[4]Regions Bank, in its capacity as indenture trustee, filed a motion to intervene in this action on the eve of trial. (Doc. 47). Regions asserted causes of action for conversion, conspiracy and unjust enrichment against the Defendants. The Court denied the motion to

APR used the proceeds from the sale of bonds to acquire assets. Each time APR sought to use bond monies, it had to submit a requisition to Regions Bank. Requisitions were submitted for the purchase of the trucks in question. (PEX 6 &11/DEX 15 & 16). In addition to the monies raised through the bond issue, APR borrowed additional money for working capital from Regions Bank at the outset of the venture.[5] The evidence shows that this loan, and several subsequent loans, were guaranteed by the Defendants. The Court finds that the trucks in question were purchased with proceeds from the bond issue. APR provided the funds for the purchase of the trucks, APR used the trucks in its business, and Blount, acting on behalf of APR, sold the trucks to an unrelated third party. For these reasons, the Court finds that the trucks were the property of APR and not the IDB.

APR began its operations in 1999 and lost money from the start. In an effort to turn things around, B.P. Holdings hired a business consultant to make recommendations for changes to the business. In addition, B.P. Holdings began to take a more active role in the operations of APR. The testimony adduced at trial was conflicting as to the relative membership interests of the two members of APR. Defendants maintain that as additional capital was provided to APR the membership share of B.P. Holdings increased and that of Mullis correspondingly decreased.

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intervene as untimely pursuant to Federal Rule of Civil Procedure 24(a). (Doc. 51); see FED. R. CIV. PRO. 24(a) (requiring "timely application"). This proceeding was commenced with a complaint filed July 8, 2002. (Doc. 1). Regions did not file the motion to intervene until fourteen months later, on September 8, 2003, three days before trial.

[5]This appears to have been necessary because a relatively small amount of the series-B bonds were sold; therefore there was a relatively small amount of money available to use for working capital.

Other testimony indicated that the shares remained constant. The conflict is not relevant to the instant controversy because it is clear that regardless of whether their membership share actually increased, B.P. Holdings took a more active role in the management of APR and ultimately terminated Mullis in August of 2000.

C. The Sale of the Trucks

During this time, APR began to explore different options to make the business profitable. The company had already closed down the manufacturing part of the business and was considering whether to sell or hold onto the routes. Randal Smith, who had taken over as Chief Executive Office of APR, introduced American Proteins to Blount as a potential purchaser of certain assets and routes. After some negotiations with Smith and Blount, American Protein offered to purchase the five trucks which are the subject of this dispute for a total of $524,000.00.[6] Blount testified that he believed that the trucks were owned outright by APR. He did not know whether the trucks were purchased with bond proceeds or whether Regions Bank would have an interest in the trucks. Further, Blount testified that he believed he was acting with the authority of the IDB. The sale closed on November 20, 2000. At Blount's request, the check for $524,000.00 from American Proteins was made payable to B.P. Holdings. The evidence presented at trial showed that these funds were deposited into an account of B.P. Holdings. The diversion of the $524,000.00 sale proceeds, which were the property of APR, into the account of B.P. Holdings was a transfer for no consideration.

[6]Four 1999 McNeilus route trucks at $130,000.00 each and one Ford F7000 boom truck at $4,000.00.

D. The Transfers from B.P. Holdings

However, there is more to the story. The Defendants contend that B.P. Holdings was a mere conduit for APR and for that reason, the transfer was not a fraud upon the creditors of APR. The Court must now examine the transfers from the B.P. Holdings bank account. After receipt of the $524,000.00 from American Proteins, B.P. Holdings issued the following checks:[7]

1. Check No. 1077, dated November 20, 2000, payable to Troy Bank & Trust, in the amount of $101,082.90.
2. Check No. 1078, dated November 20, 2000, payable to Regions Bank, in the amount of $202,038.83.
3. Check No. 1079, dated November 21, 2000, payable to FNB, in the amount of $62,899.37.
4. Check No. 1082, dated November 29, 2000, payable to Colonial Bank, in the amount of $152,814.13.

These four checks total $518,835.23. The Defendants were unable to account for the remaining $5,164.77. In other words, $524,000.00 (the sale proceeds), less $518,835.23 (the total of the four checks contained in Defendants' Exhibit 13), equals $5,164.77 (the unaccounted for funds).

The Court, having examined the facts and circumstances surrounding the transfer of the $524,000.00 to B.P. Holdings, finds that the transfer was made for no consideration and for the purpose of placing the funds beyond the reach of APR's creditors. This finding is based upon the following facts. First, the transfer was to an insider. B.P. Holdings held 40% of the stock of

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[7] See PEX 31 & 32/DEX 13 (copies of checks).

APR. See PEX 53. Second, APR did not receive anything of value for the transfer to B.P. Holdings, except to the extent that B.P. Holdings disbursed some of that money in payment of obligations owed by APR. Third, APR was insolvent at the time of the transfer. An additional fact which supports this finding is that the transfer itself was irregular in form. Transactions like this were not in the normal course of business. The Defendants contend that B.P. Holdings was a mere conduit for APR and that debts of APR were paid with the transfers made by B.P. Holdings.[8] While not conceding the existence of any of the badges of fraud, except the insolvency of the Debtor, the Defendants contend that the transfer to B.P. Holdings was not a fraud on the creditors of APR because debts of APR were paid. The Court will examine each of the four transfers and consider this defense in detail.

1. Check No. 1077

First, considering the transfer represented by Check No. 1077, the Court observes that this transfer is supported by a promissory note dated October 17, 2000, in the amount of $100,150.00, which was made by APR. See DEX 22. Therefore, it appears that this transfer did in fact satisfy an obligation owed by APR. Thus, the evidence shows that the funds represented by this transfer were not placed beyond the reach of creditors, but rather that the funds were used to satisfy an indebtedness of APR.

[8] It should be noted that at least two of the defenses raised are internally inconsistent. First, the Defendants have separately contended that trucks in question were the property of the IDB and not of APR. If that is so, then the proceeds should have been paid to the IDB and not to B.P. Holdings. Second, if the Defendants truly believed that the trucks were the property of the IDB, the proceeds should not have been used to debts of APR. See Proposed Findings of Fact and Conclusions of Law filed by the Defendant. (Doc. 55, pp. 1-4, 9-12 (trucks were the property of IDB), 7- 8, 16-17 (BP Holdings was a conduit for APR)).

2. Check No. 1078

Second, the Court will examine the transfer represented by Check No. 1078. This transfer is supported by a promissory note dated September 3, 1999, in the amount of $200,050.00, which was made by APR. See DEX 20. Again, the evidence shows that this transfer did in fact satisfy an obligation owed by APR. For this reason, as in the case of Check No. 1077, the Court finds that the funds represented by this transfer were not placed beyond the reach of creditors, but rather were used to satisfy an indebtedness of APR.

3. Check No. 1079

Third, the Court will examine the transfer represented by Check No. 1079. The Defendants offered into evidence a copy of a promissory note in the principal amount of $150,060.00, which was made by William B. Blount, in his individual capacity. See DEX 21. At first glance, it would appear that the transfer represented by Check No. 1079 is nothing more than a transfer by B.P. Holdings to satisfy a owed by William Blount in his individual capacity, payable to the First National Bank of Brundidge. If that is the case, then APR received no consideration for the transfer and the transfer is therefore fraudulent. Blount testified that the proceeds from this note were used to benefit APR. However, this claim is not corroborated by any supporting documents, except for a reference in the promissory note.

At the bottom of the promissory note (DEX 21) the following language appears:

> BUSINESS: PURCHASE FREEZER BOXES FROM PIKE FABRICATION, INC.
>
> THESE BOXES WERE BUILT UNDER PURCHASE ORDERS INVOICED TO PIKE FABRICATION, INC. AND ASSIGNED TO THE FIRST NATIONAL BANK OF BRUNDIDGE, AL. BY

> APR, INC. OF TROY, AL. THE BANK HAS 57 INVOICES OUTSTANDING AT THIS TIME. THESE BOXES WILL BE PURCHASED BY WILLIAM B. BLOUNT AND USED BY APR, INC. TO STORE THE DIED [sic] CHICKENS THAT WILL BE USED BY APR, INC. FOR FEED. MR. BLOUNT IS A PRINCIPAL OWNER OF APR, INC. THIS IS BEING [sic] UNDER AN AGREEMENT BETWEEN MR. WILLIAM B. BLOUNT AND APR, INC.

This language makes reference to an agreement between Blount and APR, however, no documentation was provided to show that such an agreement actually existed and there was no specific testimony on this point. The nature and substance of this transaction is far too vague and tenuous to conclude that the funds represented by Check No. 1079 were in fact used to satisfy an indebtedness owed by APR. To be sure, there is some indication that the proceeds of the promissory note were used to build boxes used by APR, however, it appears that the boxes were the property of Blount. The manner in which the boxes were actually used by APR, and the liability of APR for its alleged use of the boxes, were not shown by the evidence. Based upon its consideration of the evidence, the Court finds that the indebtedness satisfied by this transfer was an indebtedness owed by Blount and not by APR. Therefore, this transfer is a transfer for which APR did not receive any consideration in return. In this instance, the "conduit" theory advanced by the Defendants fails.

4. Check No. 1082

Fourth, the Court will examine the transaction represented by Check No. 1082. This check, dated November 29, 2000 and made payable to Colonial Bank in the amount of $152,814.13, is not supported by any documentary evidence. The Defendants claim that this amount was used to satisfy an indebtedness owed by APR. However, the Count cannot find any

documentary evidence in support of this claim. It is quite irregular for an insolvent corporation to sell property and divert the proceeds into the bank account of a related entity, pay a sum of money in excess of $150,000.00, and have no documentary proof that the funds did in fact satisfy a debt owed by the insolvent corporation. B.P. Holdings could easily have satisfied an indebtedness of its own and capitalized upon its own sloppy record keeping, thereby defrauding the creditors of APR. Moreover, this check was dated nine days after the proceeds from the sale of the trucks were deposited into the bank account of B.P. Holdings, which raises additional suspicions and undercuts the "conduit" theory advanced by the Defendants. Furthermore, the memorandum line on the check does not make any reference to any indebtedness of APR. The Court heard Blount's oral testimony, wherein he testified that this was an indebtedness owed by APR, but the Court does not give it credence. The Court finds that APR received no consideration for the funds represented by Check No. 1082, in the amount of $152,814.13.

5. Unaccounted for funds

The trucks in question were sold for $524,000.00. The total of the four checks discussed immediately above is $518,835.23. This leaves a difference of $5,164.77. The Defendants have no documentary evidence to show what happened to these funds.[9] Blount testified that he thought the money had been spent on behalf of APR. The Court is unwilling to accept such a

[9] See DEX 27 (check dated 10/25/00 from B.P. Holdings to Regions Bank in the amount of $3,696.09). The Defendants argued that this payment was mostly likely the payment of interest to Regions before the loan renewal. Then part of the funds remaining from the sale of trucks would be credited to B.P. Holdings as a repayment of this advance. The Defendants provided absolutely no documentation of this transaction and there is nothing to show that this check has anything to do with APR

breezy explanation. The Court finds that the Trustee has shown that this amount was transferred from APR for no consideration.

E. Blount and B.P. Holdings

Defendants Blount and B.P. Holdings are named as separate defendants and are in fact separate legal entities. However, in the context of this Adversary Proceeding, Blount and B.P. Holdings acted in concert. After hearing the evidence and upon consideration of the record, the Court finds that Blount so dominated and controlled the actions of B.P. Holdings with respect to the sale of APR's trucks and subsequent payments made with the proceeds of that sale, that the actions of B.P. Holdings should be attributed to Blount individually and visa versa. The evidence adduced at trial showed specifically that Blount negotiated the sale on behalf of APR, Blount directed that the money be deposited into the account of B.P. Holdings and that Blount decided who to pay with the proceeds of the sale. All of the evidence showed that Blount totally dominated the actions of B.P. Holdings with respect to the transactions at the center of this Adversary Proceeding.

F. Factual Summary

Defendant Blount caused APR to sell five trucks to American Proteins for $524,000.00. At Blount's request, American Proteins made its check payable not to APR, the seller, but rather to B.P. Holdings, a Limited Liability Company which was owned, either directly or indirectly by Blount. On Blount's orders, B.P. Holdings caused four checks to be issued. The Court finds that two of those checks (Check No. 1077 and Check No. 1078) totaling $303,121.73, were used to pay debts owed by APR. Therefore, these transfers were not fraudulent. On the other hand, the

other two checks (Check No. 1079 and Check No. 1082), which total $215,713.50, were not used to pay debts owed by APR and therefore constitute transfers for no consideration. In addition, the Court finds that the unaccounted for funds, in the amount of $5,164.77, also represent a transfer for no consideration. The total amount transferred by APR, to Blount and B.P. Holdings, for which no consideration was received in return, is $220,878.27.

II. LEGAL CONCLUSIONS

A. Jurisdiction

This is an adversary proceeding to set aside as fraudulent the transfer of certain funds which were property of APR. As the Trustee's cause of action has evolved over time, it may be useful to discuss the nature of his claim and its evolution. In the Trustee's initial complaint and his first amended complaint, it appears that he had focused his attention on the sale of five trucks to American Proteins. However, his attention shifted downstream as the litigation proceeded. The $524,000.00 from the sale of the trucks was deposited into a bank account of B.P. Holdings, notwithstanding the fact that the funds were the property of APR and that B.P. Holdings did not have any interest in those cash proceeds. Shortly after the sale of the trucks, which occurred on November 20, 2000, B.P. Holdings caused some of those proceeds to be transferred to creditors of APR. It is this downstream payment which has been the focus of the majority of the Trustee's attention. To further complicate matters, either B.P. Holdings or Blount himself were liable on the debts which were satisfied by the downstream transfers. Thus, Blount caused APR to prefer those creditors who held notes on which either he or B.P. Holdings was liable in some capacity. This sounds suspiciously like a preference action. See 11 U.S.C. § 547. However, the Trustee

plead causes of action for fraudulent conveyance and conversion.[10] The Court finds that it has jurisdiction to hear this Adversary Proceeding pursuant to 28 U.S.C. § 1334(b). This is a core proceeding. 28 U.S.C. § 157(b)(2)(H). Therefore, this Court has jurisdiction to hear this Adversary Proceeding and enter a final order.

B. Trucks Were Property of Estate

As a preliminary matter, the Court finds that the five trucks in question were property of the bankruptcy estate. Section 541(a)(1) provides that subject to certain exclusions, property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. This provision is to be broadly construed. *In re* Thomas, 883 F.2d 991, 995 (11th Cir. 1989).

Defendants argue that the IDB owned the trucks in question and that the IDB had equitable title and a resulting trust on all property purchased with bond proceeds. The Court heard testimony regarding the relationship between IDB and APR and has considered the documentary evidence presented. The Court finds that APR had an interest in this property. In making this determination, the Court rejects the Defendant's contention that the IDB retained all equitable title to the trucks.

The Defendants have refuted their own contention previously. See DEX 11 (Contract between American Proteins, Inc. and Alabama Protein Recycling, LLC); Blount testimony. The

[10] The Trustee moved to amend his complaint, for the third time, after the close of evidence at trial. The Court will discuss that motion infra. For purposes of considering this Court's jurisdiction, the Court will consider this a fraudulent conveyance suit or a suit to recover property of the estate.

contract states, "B.P. Holdings, LLC by and through its Managing Member, William B. Blount, specifically warrants that it is the majority member of APR and has legal power and authority to sell all of the assets in this contract." In signing this contract, Blount represented to American Proteins that the trucks were the property of APR. He cannot now be heard to claim otherwise.

Moreover, the evidence presented at trial showed overwhelmingly that APR had an interest in these five trucks. The trucks were purchased with funds borrowed by APR under the bond issue. APR then provided the funds to purchase the trucks. The trucks were listed on APR's tax returns and balance sheets and used in the daily operations of the Debtor. Defendant Blount, acting on behalf of APR, sold the trucks to an unrelated third party. Counsel for the IDB even testified that he believed APR was the beneficial owner of the trucks.

C. Fraudulent Conveyance

The Trustee asserts causes of action for fraudulent conveyance under the Bankruptcy Code and under Alabama law. Section 548(a) governs fraudulent conveyances and provides, in part, as follows:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily-
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> (A) made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
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> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
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> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

11 U.S.C. § 548. In this case, the parties have stipulated that the trucks were sold for fair market value so there is no claim under 11 U.S.C. § 548(a)(1)(B).

In addition, there is no dispute that the sale occurred within one year of the involuntary petition. The evidence presented at trial showed that the sale closed on November 20, 2000. The involuntary petition was filed against APR on February 5, 2001. Therefore, the case under Section 548(a)(1)(A) turns on whether the Defendants sold the trucks "with actual intent to hinder, delay, or defraud." 11 U.S.C. § 548. "Because proof of 'actual intent to hinder, delay, or defraud' creditors . . . may rarely be accomplished by direct proof . . . courts should look to the existence of certain badges of fraud." *In re* XYZ Options, Inc., 154 F.3d 1262, 1271 (11th Cir. 1998) (citations omitted). The badges of fraud to be considered include the following:

> (1) The transfer was to an insider;
> (2) The debtor retained possession or control of the property transferred after the transfer;
> (3) The transfer was disclosed or concealed;
> (4) Before the transfer was made the debtor had been sued or threatened with suit;
> (5) The transfer was of substantially all the debtor's assets
> (6) The debtor absconded;
> (7) The debtor removed or concealed assets;
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred;
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made;
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Id. at 1271-1272 (citing Alabama Code).

Considering this evidence against the "badges of fraud" discussed supra, the Court finds that the Trustee has established the existence of multiple badges of fraud in the initial diversion

of the $524,000.00 sale proceeds to B.P. Holdings. Specifically, the Court finds that the Defendants intended to defraud other creditors of APR by placing these funds beyond their reach. The testimony at trial established that the money was placed in the account of B.P. Holdings in order to prevent a potential tax lien from attaching to the proceeds. Defendants clearly intended to place the proceeds beyond the reach of the taxing authority. Considering the transaction as a whole, the Court finds persuasive that an insider took control of property of the estate, sold it, and placed the proceeds into his own bank account. APR was insolvent at the time of the transfer and did not receive anything of value when these proceeds were initially transferred to B.P. Holdings.

Looking downstream at the payments made from B.P. Holdings bank account, the Court concludes that the Defendants have established a valid defense as to a portion of the diverted proceeds. Specifically, the Court finds that B.P. Holdings acted as a "mere conduit" with respect to the monies paid to Troy Bank & Trust and Regions Bank. (Checks No. 1077, 1078). The evidence adduced at trial showed that the promissory notes paid by these two checks were debts

owed by APR.[11] Further, the evidence showed that B.P. Holdings paid these notes on the same day that the sale closed, November 20, 2000.

Section 550(a)(1) provides that the trustee can only recover a fraudulent conveyance from "the initial transferee of such transfer or the entity for whose benefit such transfer was made." 11 U.S.C. § 550(a)(1). The Eleventh Circuit previously has used a conduit, or control, test to determine whether a defendant falls within the ambit of Section 550(a)(1). See Nordberg v. Arab Banking Corp. (*In re* Chase & Sanborn Corp.), 904 F.2d 588, 597-600 (11th Cir. 1990); Nordberg v. Societe Generale (*In re* Chase & Sanborn Corp.), 848 F.2d 1196, 1199-1200 (11th Cir. 1988). The test focuses on the transferee's control over the funds in question. Arab Banking Corp., 904 F.2d at 598. The test "requires courts to step back and evaluate a transaction in its entirety to make sure that their conclusions are logical and equitable." Societe Generale, 848 F.2d at 1199. If the transferee acts merely as a conduit for a party who has a direct business relationship with the Debtor, he is not an "initial transferee" against whom the Trustee may recover pursuant to Section 550(a)(1). Arab Banking Corp., 904 F.2d at 598 (citing *In re* Columbia Data Products, Inc., 892 F.2d 26, 28 (4th Cir. 1989)).

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[11]The Trustee makes much of the fact Blount guaranteed these two notes personally, arguing that the payment of these creditors, to the exclusion of the other creditors, gives rise to an inference of fraudulent conduct. However, "[t]here is a radical difference between defrauding creditors and making a preference." Fulghum v. Brown *(In re* Brown), 291 F. 430 (S.D. Ga. 1923) (discussing Section 67(e) of the Bankruptcy Act, containing the same operative language as Section 548 of the Bankruptcy Code). Indeed, "[t]he intent to delay or hinder seemingly implicit in any *preferential* transfer by an insolvent debtor, has, however, been held not to constitute the actual fraudulent intent required under former Section 67e. [footnote omitted]. This interpretation . . . surely holds true for Section 548(a)(1)." L. KING, *Collier on Bankruptcy*, Section 548.02 (15th ed. 1996). For the reasons set forth infra, the Court does not reach the question of whether these two payments would give rise to preference liability.

Applying this test to the proceeding at bar, it is undisputed that the funds were deposited into B.P. Holdings' bank account. B.P. Holdings then transferred a portion of those funds to creditors of APR, namely Regions Bank and Troy Bank & Trust. The evidence shows that B.P. Holdings effected the transfer to those creditors on the same day that the sale closed and the proceeds were deposited into B.P. Holdings' account. Upon consideration of the evidence and testimony, the Court finds that B.P. Holdings acted on behalf of APR with respect to the $303,121.73 paid to these two creditors. In making this determination, the Court finds that the Defendants did not attempt to exercise control over this money, but rather immediately paid debts of APR. In so doing, B.P. Holdings acted as a conduit through which creditors of APR were paid.

Having found that the Defendants' defense applies to a portion of the diverted sale proceeds, the Court will next consider whether the Trustee has proven his fraudulent conveyance case as to the remaining $220,878.27. As stated supra, the Court finds that the Trustee has established the existence of multiple badges of fraud. In determining whether this evidence is sufficient to establish an actual intent to hinder, delay or defraud, the Court is persuaded that "the confluence of several [badges of fraud] can constitute conclusive evidence of an actual intent to defraud." *In re* XYZ Options, Inc., 154 F.3d at 1271, n.17 (quoting *In re* Sherman, 67 F.3d 1348, 1354 (8th Cir. 1995) (internal quotation omitted)).

In the instant situation, after consideration of the evidence and testimony, the Court finds that the Trustee has proven that the Defendants acted with actual intent to hinder, delay or defraud APR's creditors. As stated supra, the Court finds that the diversion of proceeds

represents a transfer made for no consideration and for the purpose of placing the money beyond the reach of APR's creditors. The transfer was to an insider and the Debtor did not receive anything of value in return for the transfer. Further, APR was insolvent at the time of the transfer and the transfer was outside the normal course of business. The Defendants' defense, that B.P. Holdings acted as a "mere conduit" with respect to all of the diverted proceeds, fails as to this remaining $220,878.27.

As to the $62,899.37 paid to FNB (Check No. 1079), the Court finds that this amount was used to satisfy a debt owed by Defendant Blount, not by APR. The payment of this debt represents a transfer for which APR received no consideration in return. In electing to make this transfer, the Defendants exercised control over this money and did not act as a conduit on behalf of APR. Likewise, as to the $152,814.13 paid to Colonial Bank (Check No. 1082), the Court finds that this transfer does not represent payment of an obligation owed by APR. Indeed, there was no credible evidence presented regarding the nature of the obligation satisfied by this transfer. Further, the nine day delay between the deposit of the $524,000.00 sale proceeds and the payment to Colonial Bank, bolsters the Court's conclusion that the Defendants intended to exercise control over this money. Finally, as to the $5,164.77, which has been unaccounted for, the Court finds that the Defendants kept this money for their own use. Because a fraudulent transfer claim under Alabama law also requires proof of "actual intent to hinder, delay, or defraud," the Court reaches the same result under Alabama law. ALA. CODE § 8-9A-4.

D. Conversion

To establish conversion under Alabama law, a plaintiff must present evidence of "a wrongful taking or a wrongful detention or interference, or an illegal assumption of ownership, or an illegal use or misuse." *Ex Parte* Anderson, 2003 WL 21127801, at *3 (Ala. 2003) (citing Ott v. Fox, 362 So.2d 836, 839 (Ala.1978); Huntsville Golf Dev., Inc. v. Ratcliff, Inc., 646 So.2d 1334, 1336 (Ala.1994)). As to the $303,121.73 paid to Troy Bank & Trust and Regions Bank, the Trustee has not provided such evidence. As discussed supra, the Court finds that the these payments were in satisfaction of debts owed by APR. Defendants acted on behalf of APR in making these payments. Therefore, the Court finds that there was no attempt by the Defendants to exercise dominion or control, to the exclusion of APR, over these proceeds.

E. Unjust Enrichment

The doctrine of unjust enrichment is an equitable remedy which permits courts to "disallow one to be unjustly enriched at the expense of another." Avis Rent A Car Systems, Inc. v. Heilman, 2003 WL 22113911, at *9 (Ala. 2003) (citing Battles v. Atchison, 545 So.2d 814, 815 (Ala. Civ. App. 1989)). "To prevail on a claim of unjust enrichment, the plaintiff must show that the 'defendant holds money which, in equity and good conscience, belongs to the plaintiff or holds money which was improperly paid to defendant because of mistake or fraud.'" Id. (citing Dickinson v. Cosmos Broad. Co., 782 So.2d 260, 266 (Ala. 2000) (internal citation omitted)).

As to the $303,121.73 paid by B.P. Holdings to Troy Bank & Trust and Regions Bank, the evidence shows that the these sums ($101,082.90 paid to Troy Bank & Trust; $202,038.83 paid to Regions Bank) were paid in satisfaction of debts owed by APR. Therefore, it cannot be

said that the Defendants are "holding" APR's money with respect to money paid to these two creditors.

F. Preference

At the conclusion of the trial, the Trustee orally moved to conform to the evidence and include a cause of action for preference pursuant to 11 U.S.C. § 547. The Trustee supports his position in the post-trial brief. (Doc. 56). The Defendants objected to the proposed amendment at the hearing and later by their objection filed November 11, 2003. (Doc. 57).

Amendments to pleadings are governed by Federal Rule of Civil Procedure 15, made applicable to adversary proceedings in bankruptcy by Bankruptcy Rule 7015. Rule 15(b) allows a party to seek amendments to the pleadings at trial and provides, in part, as follows:

> (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues to amend does not affect the result of the trial of these issues. If evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby *and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits.*

FED. R. CIV. PRO. 15(b) (emphasis added). The rule "provides that unpled issues which are tried with either the express or implied consent of the parties are to be treated as if they were raised in the pleadings." Cioffe v. Morris, 676 F.2d 539, 541-42 (11th Cir.1982).

> The corollary is, of course, that a judgment may not be based on issues not presented in the pleadings and not tried with the express or implied consent of the parties. Moreover, implied consent under Rule 15(b) will not be found if the defendant will be prejudiced; that is, if the defendant had no notice of the new

> issue, if the defendant could have offered additional evidence in defense, or if the defendant in some other way was denied a fair opportunity to defend.

Id. (citations omitted).

In deciding motions to amend, courts should consider factors including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party by virtue of allowance of the amendment." Foman v. Davis, 371 U.S. 178, 181-83 (1962). The instant case presents no evidence of bad faith or dilatory motive on the part of the Trustee. However, the factors of undue delay, repeated failure to cure deficiencies and undue prejudice weigh against the Trustee.

At the outset of the trial, the Court inquired of the Trustee why this was not brought as a preference action. At that point, the counsel for the trustee responded that he first became aware of a basis for a preference action when the Defendants filed their motion for summary judgment on July 31, 2003. (Doc. 40). Defendants allege that the Trustee was on notice of the facts to support a potential preference claim as early as March 4, 2003, after the deposition of Defendant Blount. (Doc. 57, p. 6). However, the Trustee chose not to amend his complaint at that time and instead waited to move to amend his complaint to include a count for preference until the close of all evidence. In so doing, the Defendants were denied any notice that the Trustee was seeking to pursue a preference claim and were not afforded an opportunity to defend against the claim. Moreover, upon consideration of the evidence presented and the Court's discussion with counsel during trial, the Court finds that there was no express or implied consent by the Defendant to try the preference action. Accordingly, the Court will deny the motion for leave to amend.

III. Conclusion

For the reasons set forth above, the Court will enter judgment for the Plaintiff in the amount of $220,878.27. This recovery is based upon the Court's finding that the Plaintiff proved his case for fraudulent conveyance as to the sale proceeds for which B.P. Holdings did not act as a mere conduit. The Court will enter a separate judgment in this matter.

Done this 19th day of February, 2004.

/s/ William R. Sawyer
United States Bankruptcy Judge

c: Floyd R. Gilliland, Jr., Attorney for Plaintiff
Leonard N. Math, Attorney for Plaintiff
Lee R. Benton, Attorney for Defendants